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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE ex rel. DEPARTMENT OF
TRANSPORTATION,

Plaintiff and Respondent,

v.

JAMES CONSTANT,

Defendant and Appellant.

E049886, E049988

(Super.Ct.No. SCVSS096961)

OPINION

APPEAL from the Superior Court of San Bernardino County. Christopher J. Warner, Judge. Affirmed.

James Constant, in pro. per., for Defendant and Appellant.

Ronald W. Beals, Linda Cohen Harrel, and Eric J. Fleetwood for Plaintiff and Respondent.

This is another in a long line of appeals brought by appellant James Constant in connection with the taking of his one and one-half acre parcel in Fontana (the property) by respondent California Department of Transportation (the State) in order to extend the I-210 freeway. Constant filed several petitions for writ of mandate contesting that the

State could rightfully take his property, which we denied, thereby affirming the taking of the property. Constant then appealed the awarded compensation in three consolidated cases. In our opinion on those appeals (*The People ex rel. Department of Transportation v. James Constant* (May 13, 2009, E044802, E045320 & E046012 [nonpub. opn.] (the prior opinion))), we affirmed the trial court’s grant of the State’s judgment notwithstanding the verdict (JNOV) reducing the jury’s award of just compensation to Constant for the property. We remanded to the trial court to determine the costs to which Constant was entitled under Code of Civil Procedure sections 1268.710 and 1268.720.¹

Upon remand, the trial court awarded Constant his costs of suit in the amount of \$1,736.82 and appellate costs in the amount of \$11,102.14. It granted the State’s motion to tax costs in part, denying Constant payment of his attorney fees and costs for preparing his trial exhibits. Constant also filed a motion to set aside the judgment under section 663, which was denied by the trial court.

In case No. E049886, Constant appeals the grant of the State’s motion to tax costs. In case No. E049988, Constant appeals the denial of his request to set aside the judgment.

We affirm both the trial court’s grant of the State’s motion to tax costs and its denial of defendant’s motion to set aside the judgment.

¹ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

I

FACTUAL AND PROCEDURAL BACKGROUND²

The San Bernardino County Board of Supervisors adopted a resolution of necessity to condemn the property owned equally by Constant and his brother Robert Constant (Robert) since Constant and Robert refused to sell the property to the State. The property was to be used to create a freeway frontage road in accordance with the extension of the I-210 freeway. On May 21, 2002, the State deposited \$187,000 pursuant to section 1255.010, subdivision (a).³

The trial court found that the State had a right to take the property. Constant brought several petitions for writ of mandate contesting the taking, which were denied by this court.

After a jury trial, the jury entered its verdict that the fair market value of the property was \$390,756.85. The trial court granted the State's JNOV, finding the jury verdict did not match the valuation testimony at trial. The judgment was reduced to \$194,189. Constant was awarded \$97,094.50 (his half-interest share of the property) and

² The prior opinion exhaustively documented the history of this case, and we incorporate it into this opinion by reference. We only briefly review the background and continue with the facts occurring subsequent to the opinion.

³ Constant has stated in his opening briefs that the "record of prior consolidated case Nos. E044802, E045320 and E046012 is adopted by reference as if set forth herein in full." However, those cases have not been consolidated with the instant cases. Accordingly, we take judicial notice of the records and the opinion filed in those cases. The State's request for judicial notice of our opinion is deemed moot. Constant misinterprets California Rules of Court rule 8.1115 (a) in arguing that the unpublished opinion cannot be relied upon in this case; it can be relied upon under subdivision (b)(1).

the filing fee cost of \$220. The judgment in condemnation was entered on October 26, 2007. The trial court denied all other costs to Constant.

In the prior opinion, we affirmed the judgment of the trial court. However, we remanded for the limited purpose of determining the proper costs to be awarded Constant under sections 1268.710 and 1268.720.

Constant thereafter filed a motion for costs and a memorandum of costs, and the State filed a motion to tax costs, as will be discussed in more detail, *post*. On November 9, 2009, a judgment was filed awarding Constant \$97,064.50 plus interest, \$1,736.82 in costs of suit, and \$11,102.14 in appellate costs. Constant filed a notice of appeal from the grant of the State's motion to tax costs.

In addition, on October 7, 2009, defendant filed a motion to set aside the judgment pursuant to section 663. He raised nine claims of error that he claimed mandated reversing the judgment. The State filed opposition. The substance of the motion, opposition, and hearing on the matter will be explicated, *post*. The trial court denied the motion to set aside the judgment, finding that the issues had already been adjudicated by the state and federal appellate courts. Constant filed a notice of appeal from the denial of the motion to set aside the judgment.

II

STATE'S MOTION TO TAX COSTS

In case No. E049886, Constant contends that the trial court erred by granting (in part) the State's motion to tax costs. He insists that the trial court should have granted his

request for attorney fees in the amount of \$16,418.01. He also claims he was entitled to \$1,647.53 for the cost of preparing his exhibits for trial.

A. *Additional Factual Background*

Constant filed his memorandum of costs requesting the costs that were awarded by the trial court (and not disputed on appeal); he also requested \$1,647.53 for 96 exhibits that he prepared for trial. In addition, he declared that from 2002 through 2005 he was represented by counsel and paid counsel \$16,418.01. There were no attached receipts or billing statements.

The State filed an amended motion to tax costs. It objected to the request for attorney fees. The State insisted that Constant was not the prevailing party as defined in section 1032 and that attorney fees were recoverable in an eminent domain action only under section 1250.410. The State contended that Constant, in his previous appeals, specifically stated that he was not seeking fees under that section. Further, the case was remanded for the sole purpose of deciding costs, not attorney fees. The State also argued that Constant should not receive payment for the cost of his exhibits. None of the exhibits pertaining to valuation were admitted at trial. Additionally, since the jury essentially rejected the evidence presented at trial, no exhibit was helpful to the jury in reaching its verdict. The State concluded, “Absent a showing that a particular exhibit was indeed helpful to the trier of fact, the State moves to tax such costs.”

In his reply to the State’s motion to tax costs, Constant contended that under sections 1033.5, subdivision (a)(C)(1) and 1032, subdivision (a)(4) he is the prevailing

party. He denied he was seeking the attorney fees under section 1250.410. He did not offer any reason why the cost of the exhibits should be reimbursed.

A hearing was conducted in the case on November 9, 2009. Constant chose to file this appeal without the reporter's transcript being prepared. According to the minute order, the trial court granted the State's motion to tax costs on the attorney fees and cost of exhibits "as not having been used and/or helpful to the court at trial." (Capitalization omitted.) After the hearing, the trial court signed a judgment in condemnation awarding \$1,736.82 in costs of suit and \$11,102.14 for appellate costs.

B. *Standard of Review*

"Whether a cost item was reasonably necessary to the litigation presents a question of fact for the trial court and its decision is reviewed for abuse of discretion.' [Citation.]" (*Foothill-De Anza Community College Dist. v. Emerich* (2007) 158 Cal.App.4th 11, 29-30.)

We note that Constant has chosen not to provide a transcript of the hearing. We therefore are bound by the principle that "[a] judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' [Citation.]" (*Rappenecker v. Sea-Land Service, Inc.* (1979) 93 Cal.App.3d 256, 266, italics omitted.)

C. *Attorney fees*

We remanded to the trial court in order for it to determine the costs associated with the suit and the appeal. Constant had represented to this court in the prior appeal that he was not seeking attorney fees under section 1250.410.⁴ Despite this, Constant argues in the instant appeal that factual errors require reversing the denial of litigation costs under section 1250.410.

This fails for many reasons. When Constant brought his memorandum of costs in the trial court upon remand, he did not claim attorney fees under section 1250.410. He sought fees under sections 1033.5, subdivision (a)(10)(C) and 1032, subdivision (a)(4). In fact, he acknowledged in his reply to the State's motion to tax costs that he was not raising the issue under section 1250.410. Constant's failure to raise the issue in the trial court forfeits it on appeal. (*Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 681.)

Moreover, even if he had raised the issue in the trial court, it would have been improper. We remanded for the sole purpose of determining costs. In the prior appeal, Constant specifically excluded from his appeal that he was seeking to recover litigation expenses under section 1250.410.

⁴ Under section 1250.410, both parties submit final offers and demands 20 days prior to the trial on compensation, and "litigation expenses," which include attorney fees, are calculated from those amounts.

“When an appellate court’s reversal is accompanied by directions requiring specific proceedings on remand, those directions are binding on the trial court and must be followed. Any material variance from the directions is unauthorized and void. [Citations.] When, for example, ‘a cause is remanded with directions to enter a particular judgment, it is the duty of the trial court to enter judgment in conformity with the order of the appellate court, and that order is decisive of the character of the judgment to which the appellant is entitled. The lower court cannot reopen the case on the facts, allow the filing of amended or supplemental pleadings, nor retry the case, and if it should do so, the judgment rendered thereon would be void.’ [Citation.]” (*Butler v. Superior Court* (2002) 104 Cal.App.4th 979, 982; accord, *Karlsen v. Superior Court* (2006) 139 Cal.App.4th 1526, 1530.)

We found in the prior opinion that Constant was not raising a claim of attorney fees under section 1250.410. It was impermissible for Constant to raise the issue in the trial court, and any determination by the trial court would have been void. Hence, any claim that Constant is entitled to attorney fees under section 1250.410 has clearly been waived and/or is not properly before this court.

Moreover, we do not agree with Constant that he is entitled to attorney fees under the provisions of sections 1033.5, subdivision (a)(10) (C) and 1032, subdivision (a)(4). Section 1033.5 sets forth allowable costs to the prevailing party (as defined in section 1032). Section 1033.5, subdivision (a)(10) provides that attorney fees are authorized if allowed by contract, statute, or law. Section 1032, subdivision (a)(4) defines “prevailing

party” as the party “with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant.”

Attorney fees in eminent domain actions are awarded under section 1250.410. (*Alhambra Redevelopment Agency v. Transamerica Financial Services* (1989) 212 Cal.App.3d 1370, 1380; see also *Greater Westchester Homeowners Assn. v. City of Los Angeles* (1979) 26 Cal.3d 86, 103-104, called into doubt on other grounds in *Friends of H Street v. City of Sacramento* (1993) 20 Cal.App.4th 152.) Hence, under section 1033.5, subdivision (a)(10)(C), the “statute” that provides for attorney fees is section 1250.410. Constant cannot expand the award of attorney fees by citing to another section upon which (as we discussed, *ante*) he is not entitled to recover. Hence, we find the trial court did not abuse its discretion by denying Constant his attorney fees.

Constant raises for the first time in this appeal that he is entitled to attorney fees under section 1021.5. ““An award of attorney fees under section 1021.5 requires the applicant to meet three criteria: (1) the action resulted in the enforcement of an important right affecting the public interest; (2) a significant pecuniary or nonpecuniary benefit was conferred on a large class of persons; and (3) the necessity of private enforcement and the attendant financial burden thereof make the award appropriate. Whether the applicant has proved each of these criteria is a matter primarily vested in the trial court. [Citation.]””

(*Hogar Dulce Hogar v. Community Development Com. of City of Escondido* (2007) 157 Cal.App.4th 1358, 1364.)

As stated, *ante*, we remanded to the trial court for the sole purpose of calculating costs owed to Constant. Hence he could not raise a new issue that he was entitled to attorney fees in the trial court on this purported basis. Moreover, even if he were not restricted by the remand order, he failed to raise this issue to the trial court when he filed his memorandum of costs. As such, he has waived the issue on appeal and we will not consider it. (*Pearson Dental Supplies, Inc. v. Superior Court, supra*, 48 Cal.4th at p. 681.)

D. *Exhibits*

Section 1268.710 provides that in an eminent domain action “[t]he defendants shall be allowed their costs, including the costs of determining the apportionment of the award made pursuant to subdivision (b) of Section 1260.220, except that the costs of determining any issue as to title between two or more defendants shall be borne by the defendants in such proportion as the court may direct.” Although not specified in the statutes, recovery is generally limited to items recoverable as court costs in ordinary civil actions under section 1033.5. (See e.g. *Ferrell v. County of San Diego* (2001) 90 Cal.App.4th 537, 543-544.)

Section 1033.5, subdivision (a)(12) provides that the cost of “[m]odels and blowups of exhibits and photocopies of exhibits may be allowed if they were reasonably helpful to aid the trier of fact.”

Here, we are not privy to the record of the hearing on the motion to tax costs, so we do not know on what basis the trial court denied Constant's request to be reimbursed for the exhibits. The State had argued in its motion that the exhibits were either not used or not helpful to the jury. In his reply to the motion to tax costs, Constant made no attempt to establish how the exhibits were helpful. We must assume the trial court properly exercised its discretion and found the exhibits not helpful to the trier fact. (*Rappenecker v. Sea-Land Service, Inc.*, *supra*, 93 Cal.App.3d at p. 266.) We affirm the trial court's grant of the State's motion to tax costs.

III

MOTION TO SET ASIDE THE JUDGMENT PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 663

In case No. E049988, Constant contends that the trial court erred by denying his motion to set aside the judgment filed upon remand from this court.

A. *Additional Factual Background*

Defendant filed his motion to set aside the judgment under section 663 on October 7, 2009. He claimed the judgment was improper for nine separate reasons: (1) the JNOV amount was not properly computed; (2) the judgment failed to properly apportion the compensation; (3) the judgment did not "reflect the 100% damage and no benefits"; (4) "a several judgment [was] proper"; (5) the judgment made no adjustment for rapid land increase between the date of deposit and the date of trial; (6) the judgment makes no adjustment for delay in payment between the date of deposit in 2002 and the date of trial

in 2007; (7) the JNOV was inappropriate; (8) the judgment was void because it was based solely on the State's expert and excluded evidence and testimony of value by Constant; and (9) the judgment was void because the State did not make a proper pretrial deposit.

The State argued in its opposition that a section 663 motion did not authorize setting aside the judgment on any of the grounds raised by Constant. The State filed an amended opposition stating the issues had already been resolved by the appellate courts, and section 663 could not be used to attack the compensation.

A hearing was conducted on December 15, 2009. Constant argued at the hearing that the valuation testimony presented at trial was not sufficient to support the compensation and that he should have been allowed to testify. The State responded that all of the errors had already been reviewed by the appellate courts, and remand was limited to determining costs.

The trial court denied the section 663 motion, finding, "These issues have been raised with the Appellate Court. The Appellate Court rendered a decision and the defendant, as claimed by the State, has exhausted his remedies in the case by petitioning the California Supreme Court and the United States Supreme Court. Neither of which have taken up the appeal, so the Court will deny the motion."

B. *Analysis*

Initially, Constant contends that the State failed to satisfy the requirement of California Rules of Court, rule 8.1115(c) by not attaching a copy of the prior opinion to its opposition to Constant's motion to set aside the judgment. He further contends that

the trial court likewise failed to comply with that rule by not providing him with a copy of the prior opinion when it denied the section 663 motion. In this case, however, both the parties and the trial court already had copies of the prior opinion; it would have served no purpose to provide additional copies.

Constant's remaining claims include that the trial court erred by refusing to allow him to testify as to the value of the property; the State failed to make an independent predeprivation appraisal and failed to make a statutory predeprivation offer to pay for an appraisal by Constant, and the trial court failed to vacate the order of possession; the judgment does not reflect the "9 uncontroverted issues presented in [the] § 663 motion"; the State filed a frivolous opposition to his section 663 motion; the judgment should have been reversed, as he was denied due process by being foreclosed from testifying; "the trial court perpetrated fraud in each of the 9 issues presented in the section 663 motion" (capitalization omitted); and the trial court exceeded its jurisdiction by denying his section 663 motion. The only issue that is before this court is whether the trial court abused its discretion by denying Constant's section 663 motion.

Section 663 reads: "A judgment or decree, when based upon a decision by the court, or the special verdict of a jury, may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for either of the following causes, materially affecting the substantial rights of the party and entitling the party to a different judgment: [¶] 1. Incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts; and in such case when the

judgment is set aside, the statement of decision shall be amended and corrected. [¶] 2. A judgment or decree not consistent with or not supported by the special verdict.”

Hence, ““[a] motion to vacate under section 663 is a remedy to be used when a trial court draws *incorrect conclusions of law* or renders an erroneous judgment on the basis of *uncontroverted evidence*.”” [Citations.]” (*Payne v. Rader* (2008) 167 Cal.App.4th 1569, 1574.)⁵ The decision by the trial court to deny a motion to set aside the judgment is reviewed under the deferential abuse of discretion standard. (*National Secretarial Service, Inc. v. Froehlich* (1989) 210 Cal.App.3d 510, 524.)

In his section 663 motion, Constant raises essentially the same claims he raised in the prior appeals based on the almost identical facts, and the law of the case would have precluded the trial court, and precludes us on appeal, from reaching contrary legal results. (*People v. Cooper* (2007) 149 Cal.App.4th 500, 524 [law of the case requires same conclusion where matter retried on same evidence].)

Further, even if the issues could be addressed by the trial court, Constant provided virtually no proper argument or record in the trial court (or in this court for that matter) to support that the judgment or compensation was based on the trial court’s incorrect conclusions of law or that it rendered an erroneous judgment on the basis of uncontroverted evidence. (*National Secretarial Service, Inc. v. Froehlich, supra*, 210

⁵ We note that there is a question if the section 663 motion was timely made, in that it attacks the original judgment. However, since the State does not raise the issue and we affirm the order, we need not address the issue.

Cal.App.3d at p. 525 [“[t]his shotgun attack on the judgment was not supported by any showing made by the defendants beyond the same empty technical arguments previously discussed”].) As we previously found, there are no irregularities in the judgment or the compensation award. The motion simply was not supported by any coherent argument or facts to support it in the lower court. Hence, we conclude the trial court did not abuse its discretion by denying Constant’s motion to set aside the judgment.

IV

DISPOSITION

We affirm the judgment. Under section 1268.720, we award Constant his costs on appeal despite his failure to prevail on appeal.⁶

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RICHLI
J.

We concur:

RAMIREZ
P.J.

HOLLENHORST
J.

⁶ We note that Constant’s appeal of his section 663 motion to set aside the judgment is bordering on frivolous, but departures from the general rule in eminent domain actions to award costs to the defendant landowner should be rare. (*Eastern Municipal Water Dist. v. Superior Court* (2007) 157 Cal.App.4th 1245, 1256 [Fourth Dist. Div. 2].)